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No. 918

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

THE OHIO STATE LIFE INSURANCE COMPANY, ET AL.,

Petitioners,

vs.

RAY A. CLARK, ET AL.,

Respondents.

BRIEF OF RESPONDENT

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INDEX

Foreword 1
Opinions Below 2
Jurisdiction 2
Questions Presented 2
Constitutional Provisions Involved 4
Supplemental Statement of Matter Involved 4
Article V of Columbus Mutual's Charter 7
Argument 9
A. What the Proposed Amendment Would Do 9
B. Article V Limits the Rights of the Stockholders 13
C. The Stockholders Cannot Relieve Their Stock of Restrictions by Which They Agreed to be Bound When they Acquired Such Stock 15
D. No Proposed Amendment "Entirely Prospective In Operation" is Before This Court 17
E. The Proposed Amendment, if Permitted, Would Deprive the Policyholders of Vested Property Rights Without Notice, Acquiescence, and Due Process of Law 20
Conclusion 24

TABLE OF CASES

Bank of Minden v. Clement, Admx., 256 U. S. 126 12

Bell v. Union Central Life Ins. Co., 144 O.C.C. (N.S.) 385 12

Curran v. Arkansas, 56 U. S. 304, 15 How. 304, 14 L.Ed. 705 13

Furman v. Nichol, 75 U. S. 44, 8 Wall. 44, 19 L.Ed. 370 13

Galvan v. Press, 347 U. S. 522, 74 S.Ct. 737 22

Geiger v. American Seeding Machine Co., 124 Ohio St. 222, 177 N. E. 594, 79 A. L. R. 614 13

Hathorn v. Calef, 69 U. S. 10, 2 Wall. 10, 17 L.Ed. 776.. 13

Huber v. Martin, 127 Wis. 412, 105 N. W. 1031, 3 L. R. A. (N.S.) 653 ..... 12, 21, 22, 23

Royal Trust Co. v. Equitable Life Assurance Society, 247 F. 437, C. A. 2nd 12

Schaffner v. The Standard Boiler & Plate Iron Co., 150 Ohio St. 454 12

Shields v. Ohio, 95 U. S. 319 ..... 22, 23

Superior Water, Light & Power Co. v. City of Superior, 263 U. S. 125 14

Wheatley v. The A. I. Root Co., 147 Ohio St. 127, 69 N. E. 2d 187 14

Woodruff v. Trapnall, 50 U. S. 190, 10 How. 190, 13 L.Ed. 383 13

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BRIEF OF RESPONDENT

FOREWORD

The Ohio State Life Insurance Company, one of the petitioners, will sometimes hereinafter be referred to as "Ohio State" or "Ohio State Life", and The Columbus Mutual Life Insurance Company will sometimes hereinafter be referred to as "Columbus Mutual".

The Petition for a Writ of Certiorari is referred to as the "Petition".

The Appendix to that Petition is referred to as "Petitioners' Appendix".

The Appendix to this brief is referred to as "Respondents' Appendix".

OPINIONS BELOW

The section entitled "Opinions Below" in the Petition is in proper form.

JURISDICTION

We agree with the Petitioners' jurisdictional statement.

QUESTIONS PRESENTED

We maintain that Petitioners' statement of the questions presented (Petition, pp. 2-3) is misleading because it presupposes a purely prospective charter amendment whereas the proposed amendment actually before the Court has been held retroactive by both lower courts.

The following are the questions presented to the Court of Appeals, as set forth in the opinion of that Court (Petitioners' Appendix, p. 37).

"What rights, if any, the mutual plan policyholders of Columbus Mutual have in the surplus of that company by reason of provisions of Article V of the company's charter, and whether or not the stockholders of Columbus Mutual, including Ohio State, have the right to amend Article V as they have attempted to do so."

To these questions, the Court of Appeals gave the following answers:

1. "We construe Article V as giving to the policyholders on the mutual plan a vested contract right to the beneficial interest in the surplus, subject to the prior limited claims, of the stockholders therein". (Petitioners' Appendix, p. 42).

2. "In our opinion, the proposed amendment by the stockholders, acting under the power of corporate amendment conferred by the legislature, would be an impairment of the contract obligations of the corporation running to the appellees". (Petitioners' Appendix, pp. 44-45).

In this Court, the petitioners concede the correctness of the decision of the Court of Appeals in that they say that they do not "ask this Court to review the decision of the lower court in holding that these policyholders have a vested third party contract interest in the entire surplus of Columbus Mutual", which petitioners assert amounts to some nineteen million dollars. (Petition, p. 23). Also, petitioners say that they do not seek a review "of the lower court's determination that respondents, and the other mutual plan policyholders of Columbus Mutual, possess a vested beneficial interest in the company's existing surplus and profits, including its voluntary reserves, by virtue of Article V of the company's charter". (Petition, p. 11).

Petitioners also concede that the reserved power to amend corporate charters (Article XIII, Section 2, Ohio Constitution) "cannot be exercised to impair or destroy rights of contract which vested prior to the exercise of the power". (Petition, p. 15).

Thus, the immediate questions presented to the Court are:

1. Whether the proposed amendment would be an impairment of the contract obligations of the corporation running to the Respondents? (Petitioners' Appendix, pp. 44-45).

2. Whether the Respondents would be deprived of vested property rights in the surplus without notice, acquiescence and due process of law, if the proposed amendment were permitted? (Petitioners' Appendix, p. 30).

These immediate questions lead directly to the ultimate question which is whether the stockholders of Columbus Mutual have the right to amend Article V of the charter as they have attempted to do.

CONSTITUTIONAL PROVISIONS INVOLVED

The due process provisions of the Constitution of the United States, contained in Section 1, Article XIV, Amendments, and of the Constitution of the State of Ohio, contained in Section 16, Article I, are set forth below for the convenience of the Court.

Constitution of the United States, Section 1, Article XIV, Amendments (in part):

> "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *."

Constitution of the State of Ohio, Section 16 Article I (in part):

> "All courts shall be open, and every person, for an injury done him in his land, goods, persons or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. * * *."

SUPPLEMENTAL STATEMENT OF MATTER INVOLVED

The undisputed facts (Opinion of the Court of Appeals, Petitioners' Appendix, p. 32) include several important aspects of the matter involved not recited in Petitioners' Summary Statement. Hence, we set them forth.

During the year 1956 the Ohio State Life Insurance Company, one of the petitioners, purchased 4,977 of the 5000 issued and outstanding shares of the common stock of the Columbus Mutual Life Insurance Company, constituting 99.54% of that stock. (Respondents' Appendix, pp. 3a and 35a). Although that stock had a par value of $100.00 per share and a redemption value of $200.00 per share, the price paid by Ohio State was $1300.00 per share. (Respondents' Appendix, pp. 5a, 6a and 35a, 36a). At

the time of that purchase, it was the admitted plan and program of Ohio State, its stockholders and directors, to merge Columbus Mutual into Ohio State and thereby add the net worth of Columbus Mutual to the net worth of Ohio State, a result of which would have been to increase the value of Ohio State's stock by approximately $20,000,000.00 (Respondents' Appendix, pp. 7a and 36a) at the expense of Columbus Mutual's policyholders.

Ohio State placed five of its directors and seven of its stockholders on Columbus Mutual's twelve-man board of directors, and the president and first vice-president of Ohio State assumed the same offices in Columbus Mutual. (Respondents' Appendix, pp. 3a, 4a and 35a).

Although Ohio State had paid $6,470,100.00 for the Columbus Mutual stock (at $1300.00 per share) a subsequent ruling of the National Association of Insurance Commissioners required Ohio State to value that stock upon its books at only $333.00 per share, the effect of which was to reduce Ohio State's surplus by $4,805,990.00. (Respondents' Appendix, pp. 7a, 12a, and 36a; Petitioners' Appendix, p. 58). This required valuation of the Columbus Mutual stock was directed to be maintained as long as the provisions of Article V remained in effect. (Respondents' Appendix, pp. 7a and 36a; Petitioners' Appendix, p. 58).

Recognizing the binding effect of that stock valuation, and for the purpose of carrying out their avowed intention to merge these companies, and in order that Columbus Mutual might prospectively conduct its business in conformity with the method of business of Ohio State, as a pure stock company (Respondents' Appendix, pp. 24a, 39a; Petitioners' Appendix, pp. 35, 58), the petitioners have attempted since November, 1956, to amend Article V of the Columbus Mutual charter. (Petitioners' Appendix, p. 35). They admit that they intend to and will continue

their efforts to eliminate the restrictions and limitations contained in Article V, intend to and will continue their efforts to merge Columbus Mutual into Ohio State, and intend to and will continue their plan and program to deprive Columbus Mutual's policyholders of its surplus. (Respondents' Appendix, pp. 17a and 36a).

At all times in the District Court the petitioners insisted that the surplus of Columbus Mutual was owned exclusively by the stockholders—that is, to the extent of 99.54% by Ohio State—and that the policyholders had no beneficial interest therein. (Respondents' Appendix, pp. 35a, 36a, 37a, 38a, 39a, 40a, 41a, 44a, 45a). They took the same position in the Court of Appeals. (Petitioners' Appendix, p. 41; Appellants' Brief in the Court of Appeals, pp. 12, 50; 59-60). Both lower courts held otherwise.

Because all questions in this case arise out of Article V of Columbus Mutual's articles of incorporation, the same is set forth here for the convenience of the Court (see also Petitioners' Appendix, pp. 46-47).

ARTICLE V OF COLUMBUS MUTUAL'S CHARTER

"Dividends may be declared and paid on the outstanding stock; provided that the total dividends declared or paid shall not exceed an amount computed at the rate of ten (10) per cent. per annum on the par value of the stock from the date of original issue to the date of its retirement, and, provided further that no dividend will exceed an amount equal to ten (10) per cent. per annum on the par value of the stock from the date of its original issue to the date of payment of dividend.

"Dividends on capital stock shall be paid from the surplus of the company, and the directors may pay off from such surplus and retire all of the issued and paid up capital stock at the price of two hundred dollars ($200.00) per share; and may from such surplus, when deemed advisable by the directors, return to the holders of stock the amounts which may have been paid to the company by the stockholders over and above the par value of the stock subscribed and paid for by them respectively. (Paid-in surplus was repaid in 1922). **Subject, however, to** the payment of dividends, the retirement of stock, and the return to the holders of stock of the amounts which have been paid to the company over and above the par value of the stock subscribed, **the surplus of the company shall belong to the holders of policies on the mutual plan, and shall be apportioned and distributed on such equitable plan as the directors may provide.**

"**When** all of said capital stock **shall have been so retired** and the amounts, if any, paid to the company by stockholders over and above the par value of the stock subscribed and paid for by them shall have been returned, **said company shall be reorganized, reincorporated or converted,** in any manner permitted by law, **into a mutual com-**

pany composed of the policyholders in this company. The subscriptions for such stock and the certificates of stock representing the same shall contain a provision whereby the subscriber to and holder of such stock **shall agree and assent to the provisions of this charter".** (Emphasis and parenthetical statement added)

ARGUMENT

A. What the Proposed Amendment Would do

In the District Court the amended complaint alleged, and the answer admitted (Respondents' Appendix, pp. 22a-23a, and 40a) that Columbus Mutual has issued all of its life insurance policies on the level or fixed premium plan, and that under this plan the maximum annual contribution which any policyholder can be called upon to pay is uniform or fixed throughout the life of his policy. It is alleged and admitted that in the calculation of its premium rates, Columbus Mutual has adopted one or more tables of mortality, showing the probable death rate for each age of life; it has adopted an assumed rate of interest which it might expect to realize upon its invested assets during the lifetime of each policy; it has computed premiums based thereon and has added thereto sums, known in the life insurance industry as "loading", for the purpose of conducting its business as well as any unforeseen contingencies such as an abnormal death rate due to war or pestilence. It is admitted that Columbus Mutual's premium rates, so calculated, have been in excess of said company's requirements, and will continue so to be in the future on the basis of the experience of life insurance companies generally; also that in Columbus Mutual's experience, the actual death rate has been substantially lower than the expectancy shown in the mortality tables which were assumed in calculating its premiums, and the interest rate which it has realized upon its investments has proved higher than the assumed rate. It is conceded that the "loading" has been greater than that required to cover the expense of conducting the business and to meet contingencies, and that after making due provision for a fair

and adequate margin of safety each year, the excess has been added to Columbus Mutual's surplus. It is alleged and admitted that said excess will continue to accumulate and constitutes and will continue to constitute Columbus Mutual's surplus.

The proposed amendment of Article V (Petitioners' Appendix, pp. 58-59) shows on its face that if it were to be made effective, the following results, among others, would ensue:

1. The proposed amendment would eliminate from Columbus Mutual's articles the provision that, subject to the payment of restricted dividends, the retirement of the stock at the price of $200.00 per share (double its par value), and the repayment of paid-in surplus (which was repaid in 1922), the surplus of Columbus Mutual *shall belong to* the holders of policies on the mutual plan and *shall be apportioned and distributed* on such equitable plan as the directors may determine. In place of that provision, the proposed amendment would substitute a statement that Columbus Mutual's "unassigned surplus as of December 31, 1956", to-wit: $10,739,205.07 (which is only part of relator's true surplus as of now) "shall be *held* and *used* as a special surplus for policyholders *for protection of* the holders of participating policies of the Company which are in force and effect on the effective date of this amendment".

2. Petitioners further propose that annually, for a period of 25 years, there "be added to said special surplus for policyholders, as then existing from the earnings of the Company, a percentage of such then existing special surplus equal to the net earned interest rate on the mean invested assets after all taxes based on income" (Petitioners' Appendix, p. 59). Just what would be added to the "special surplus" is not clear, but what is very plain is that a sub-

stantial part of the present surplus plus a large portion of future earnings on present business would be freed from all restrictions and released for the stockholders to use as they please.

3. The proposed amendment would eliminate from the charter the restriction of dividends to its stockholders to 10% per annum on the par value of their stock. In substitution therefor would be a statement that no dividends to any stockholders shall be paid out of said "special surplus for policyholders". Dividends in *unlimited* amounts could be paid from any other surplus funds.

4. The proposed amendment would eliminate from the charter the limitation of $200.00 per share that may be paid to the stockholders for their stock upon its retirement.

5. The proposed amenment would eliminate from the Columbus Mutual charter the *requirement* that its *surplus* (in excess of the amounts necessary to pay the restricted dividends to stockholders and retire their stock at $200.00 per share) shall be *apportioned and distributed* on such equitable plan as the directors may provide. In substitution therefor would be a statement *permitting* the directors, *in their sole discretion*, to pay dividends out of said "special surplus for policyholders" to "holders of participating policies of the Company in force on the effective date of this amendment".

6. The proposed amendment would eliminate from the charter the *requirement* that when its capital stock shall have been retired, *the company must be mutualized*—that is, converted into a mutual company composed of its policyholders. (Under existing law, such mutualization would be accomplished pursuant to Section 3913.01 to 3913.10, inclusive, Revised Code of Ohio).

7. The proposed amendment would eliminate from the charter that which is now inherent in it, to-wit: that upon dissolution *or* liquidation of Columbus Mutual all of its surplus (in excess of the amounts necessary to pay the restricted dividends to stockholders and retire their stock at $200.00 per share) would not only belong to but *would be distributed to all* of its *then* policyholders on the mutual plan. In substitution therefor would be a provision that in the event of *both* the dissolution *and* liquidation of Columbus Mutual, those of the present policyholders whose policies were *then* in force would receive *only* "amounts representing their percentage interest in said "special surplus for policyholders" "at the time of the effective date of this amendment". (Petitioners' Appendix, p. 59).

In commenting on the effect of the proposed amendment, the opinion of the Court of Appeals says (Petitioners' Appendix, pp. 44-45):

"The rights which the appellees have in the surplus of Columbus Mutual are protected by Article I, Sec. 10, of the United States Constitution which prohibits the impairment by a state of a contract obligation. It is not a question of degree; under the Constitution it is not to be impaired at all. *Bank of Minden v. Clement, Admx.*, 256 U.S. 126. In our opinion, the proposed amendment by the stockholders, acting under the power of corporate amendment conferred by the legislature, would be an impairment of the contract obligations of the corporation running to the appellees. *Bell v. Union Central Life Ins. Co.*, supra, 14 O.C.C. (N.S.) 385, affirmed 92 O.S. 522; *Huber v. Martin*, supra, 127 Wis. 412, 105 N.W. 1031, 3 L.R.A. (N.S.) 653; *Royal Trust Co. v. Equitable Life Assurance Society*, supra, 247 F.437, C.A. 2nd; *Schaffner v. The Standard Boiler & Plate Iron Co.*, 150 O. S. 454.

B. Article V Limits the Rights of the Stockholders

In this insurance company, as the Court of Appeals held (Petitioners' Appendix, p. 40), the proprietary rights of the stockholders in the assets of the company "are limited to dividends at the rate of 10% per annum on the par value of the stock, to the payment of $200.00 per share in the event of the retirement of the stock, and to have returned to them the amounts paid to the company for stock over and above the par value of the stock subscribed." (The paid-in surplus was repaid to the stockholders in the year 1922. Respondents' Appendix, pp. 21a and 40a). Beyond those rights, the stockholders "have no additional interest in the earnings and surplus of the company." (Petitioners' Appendix, p. 40). And the provisions of Article V "control the extent to which the usual rights of the stockholders have been curtailed" in Columbus Mutual. (Petitioners' Appendix, p. 39).

The limitation on the rights of Columbus Mutual's stockholders arises out of the contract created by Article V of the charter. So the Court of Appeals held. (Petitioners' Appendix, p. 39). And its decision is fully sustained by prior decisions of the Ohio courts and of this Court. See *Geiger v. American Seeding Machine Co.*, (1931) 124 Ohio St. 222, 237, 177 N.E. 594, 79 A.L.R. 614; *Curran v. Arkansas*, 56 U.S. 304, 15 How. 304, 14 L.Ed. 705; *Woodruff v. Trapnall*, 51 U.S. 190, 10 How. 190, 13 L.Ed. 383; *Hathorn v. Calef*, 69 U.S. 10, 2 Wall. 10, 17 L.Ed. 776; *Furman v. Nichol*, 75 U.S. 44, 8 Wall. 44, 19 L.Ed. 370.

A right arising out of such a contract is a limitation on the reserved power to amend corporate articles (Article XIII, Section 2, Ohio Constitution) and a statute "may not be applied retroactively to permit an alteration of the terms

of a contract made by a private corporation with its shareholders prior to the date of the enactment of statute". So it was held in *Wheatley v. The A. I. Root Co.*, (1946), 147 Ohio St. 127, 69 N.E. 2d 187, wherein the Supreme Court of Ohio expressly says:

> "The reservation of power of the state to alter or repeal general laws authorizing the formation of corporations, as set forth in Section 2, Article XIII of the Constitution of Ohio, *is limited* by the provision of Section 28, Article II that 'The General Assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts' * * *." (Emphasis added).

The Court of Appeals recognized those rules as being the law of Ohio when it said in its opinion (Petitioners' Appendix, p. 43):

> "We recognize that in Ohio, as elsewhere, there is a reserved statutory power under which the charter of a corporation can be subsequently amended without violating the sanctity of the contract between the state and the corporation. (Citing cases). But, *this does not include* the right on the part of the state, acting through the stockholders of the corporation, to amend the charter *retroactively* in a way which will impair *vested rights previously acquired* under a contract between the corporation and parties other than stockholders." (Emphasis added).

That holding coincides with this Court's decision in *Superior Water, Light & Power Co. v. City of Superior*, (1923), 263 U.S. 125. That rule is admitted by petitioners, at page 15 of the Petition, where they concede "that the reserve power of amendment cannot be exercised to impair or destroy rights of contract which vested prior to the exercise of the power".

C. The Stockholders Cannot Relieve Their Stock of Restrictions by Which They Agreed to be Bound When They Acquired Such Stock

Constitutional questions aside, a very plain reason why the proposed charter amendment was held invalid below is that it constituted a breach of the stockholders' express contractual undertaking to be bound by the restrictions and limitations as set out in Article V of the charter. In its decision, affirmed without qualification by the Court of Appeals, the District Court specifically declared that the stockholders could not relieve their stock of the restrictions and limitations of the charter of Columbus Mutual,

> "to which restrictions and limitations they consented and by which they agreed to be bound when they acquired said stock". (Petitioners' Appendix, p. 30.)

Each stock certificate, including those acquired in 1956 by the principal petitioner herein, The Ohio State Life Insurance Company, bears on its face the following legend:

> "This certificate of stock is issued and accepted subject to the terms and conditions of the Articles of Incorporation of the company, to which reference is hereby made". (Respondents' Appendix pp. 17a-18a, 37a).

This language was inserted in the stock certificates by express command of Article V of the charter which required all stock subscriptions and certificates to contain a provision whereby the subscriber and stockholder "shall agree and assent to the provisions of this charter". (Respondents' Appendix, p. 5a, 35a).

The purpose and effect of this requirement, and of the legend on the stock certificates, is at once apparent. In separating the voting power and management of the Company from the beneficial ownership of it, the founders of Columbus Mutual foresaw that the stockholders, as trustees

of the voting power, might be tempted to abuse that power precisely as Petitioners are abusing it here, that is, by seeking to enlarge their own narrowly limited interests in the company at the expense of the policyholders. Such an attempt would be forestalled, it was thought, if the stockholders were required to acknowledge and consent to the limitations and restrictions, imposed upon their stock under Article V.

That, precisely, was what the legend on the stock certificates was designed to accomplish. It was not an empty agreement by the stockholders to abide by whatever they might from time to time see fit to amend the charter to provide. It is not to be supposed that the founders of Columbus Mutual would have gone to such lengths to spell out any such self-evident proposition. The stockholders were committed to the *then existing* "terms and conditions" of a *then existing* charter, which were incorporated by reference in their stock certificates.

We do not suggest, and the lower courts did not hold, that the legend on the stock certificates precluded the stockholders from ever making any amendment of any kind in the corporate charter. What the stockholders are precluded from doing is to adopt an amendment which operates either to enlarge their own interests in the company beyond those spelled out in Article V, or otherwise to impair the substantive rights and interests of the policyholders.

The facts, incidentally, that in 1956 The Ohio State Life Insurance Company paid $1,300.00 per share for stock which under the charter was redeemable for $200.00 per share, and in November of the same year was already proposing to amend Article V out of the charter, strongly suggest that Ohio State Life intended from the outset to dishonor its agreement to be bound by Article V. (Respondents' Appendix pp. 6a, 7a, 36a)

Although Ohio State Life acquired control of Columbus Mutual for the avowed purpose of merging the two companies (Respondents' Appendix p. 10a), its real reason for trying to make the proposed amendment is crystal clear. Its real purpose was to put the present policyholders in such a position that they would have no rights or interests in the earnings or surplus of Columbus Mutual, and to put the stockholders in such position that the existing surplus, its increment and all future surplus would belong to the stockholders. If that had not been the case, then it would not have been necessary for the petitioners to attempt to amend Article V.

D. No Proposed Amendment "Entirely Prospective in Operation", is Before This Court

In their Petition for Rehearing in the Court of Appeals, the petitioners expressed their "earnest belief" that the proposed amendment was "entirely *prospective*" in operation. Now, in this Court, they reiterate that view when they say (Petition, p. 16) that the Court of Appeals erroneously determined that the proposed amendment would retroactively impair vested contractual rights to future surplus and profits conferred upon the mutual plan policyholders by Article V.

The Court of Appeals did no such thing! Neither lower Court made any such statement! What the lower Courts held was:

> (1) Article V limits the rights of the stockholders as set forth therein and reserves all other beneficial proprietary rights to the policyholders.
>
> (2) The proposed amendment would be an impairment of the contract obligations of the corporation running to the policyholders.

As we have shown above (pp 9 to 12, supra) there are at least seven particulars in which the proposed amendment

would destroy or impair existing, vested, contractual rights of the policyholders. Whether the proposed amendment is prospective to any extent in its operation is immaterial, because it *is* retroactive. *This proposed amendment* cannot be adopted because of its retroactive effect. That ends *this* case.

If the petitioners should propose some other and different amendment of Article V which would not impair or destroy any existing, vested, contractual rights of the policyholders, such an amendment might present the question that petitioners seek to argue. But such an amendment would probably constitute the basis for a different law suit, in which full exploration of all the facts could be made in the trial court. Certainly this Court will not rule "in a vacuum", so to speak, and render an advisory opinion without knowing the terms of some new amendment and the factual aspects of its operation.

If the proposed amendment were to be adopted, the existing surplus of Columbus Mutual ($12,000,000.00) and the voluntary reserves ($9,000,000.00) would no longer belong to the policyholders, because the proposed amendment deletes the language of Article V conferring such rights of ownership. (See pages 10 and 11, supra). Yet the petitioners tell this Court that they seek no review of the decision of the Court of Appeals sustaining those rights of the policyholders.

Originally, as the record shows (Respondents' Appendix, pp. 35a, 36a, 37a, 40a, 44a, 45a), the petitioners contended that the ownership of Columbus Mutual lay exclusively in its stockholders, that the surplus belonged to the stockholders, and that the policyholders had "no right, title or interest in or to said surplus".

After the Court of Appeals announced its decision, petitioners, in their Petition for Rehearing, began to change

their tune. They abandoned their former position as to the ownership of the surplus and conceded that the decision had settled "the question of whether Article V of the charter confers vested contractual rights in and to the company's surplus upon the mutual plan policyholders." (Petition for Rehearing, p. 10). They expressly told the Court of Appeals that they sought no rehearing of that Court's determination that the "beneficial ownership of the company's existing surplus is vested in the company's mutual plan or participating policyholders" and that the contractual rights of the policyholders "are protected by Article I, Section 10 of the Constitution of the United States." (Petition for Rehearing, p. 2).

Now, in this Court, the petitioners seek to contend that their proposed amendment is purely prospective and not retroactive, as the Court of Appeals held.

The petitioners talk about *future* surpluses and profits, but they ignore the conceded fact that most, if not all, of the surplus and profits to be accumulated by Columbus Mutual in future years will come from the aggregate overcharges of premiums assessed against the policyholders under the plan of doing business followed by this company. (See pp. 9 and 10, supra, and Respondents' Appendix, pp. 22a-23a, and 40a). An amendment which would appropriate such funds to the unrestricted use of the stockholders would not be "entirely prospective in operation" against these policyholders who are the beneficiaries of the contractual safeguards of Article V.

What, then, is the amendment "entirely prospective in operation" that petitioners seek to validate in this appeal? It is clearly not the proposed amendment set forth in Petitioners' Appendix, at pages 57 to 60, because that proposed amendment is obviously retroactive in its effect upon the vested contractual rights of the policyholders.

E. The Proposed Amendment, if Permitted, Would Deprive the Policyholders of Vested Property Rights Without Notice, Acquiescence, and Due Process of Law

The proposed charter amendment was adopted at a meeting of the stockholders, wholly without notice to, or consultation with, the mutual-plan policyholders, whose property rights, as we have previously shown, were so drastically affected thereby. Not only were these policyholders, (whom the lower courts held, and even Petitioners now concede, to be the beneficial owners of the corporate surplus,) to be deprived of that surplus without notice or opportunity to be heard, but they were to be afforded no compensation whatever for the deprivation of their rights. More than $19,000,000 of surplus (Petitioners' Appendix, p. 32), which under Article V of the original charter belonged to these policyholders, would have ceased to "belong" to them under the proposed amendment, but instead was to be held "for their protection". (Appendix, Petition for Certiorari, pages 58-59.) Perhaps these policyholders may be forgiven for holding suspect those who would take from them their property in order to hold it "for their protection."

Can this be "due process"? The lower courts had little difficulty in concluding that it was not. The specific holding of the District Court was

> "(3) That the mutual plan policyholders of Columbus Mutual would be deprived of vested property rights in the surplus without notice, acquiescence and due process of law if the proposed amendment were permitted." (Supplemental Opinion of District Court, Appendix, Petition for Certiorari, page 30.)

The Court of Appeals affirmed the declaratory judgment of the District Court without qualification.[1] (Petitioners' Appendix, p. 45.)

In the landmark case of *Huber v. Martin*, 127 Wis. 412, 105 N.W. 1031; 3 L.R.A. (N.S.) 653, the Supreme Court of Wisconsin struck down as unconstitutional a Wisconsin statute purporting to authorize the conversion of a mutual insurance company into a stock company without adequate compensation to the policyholders for the deprivation of their rights. In so deciding, Judge Marshall said, 127 Wis. 412, p. 439, 105 N.W. 1031, p. 1040:

> "Due process of law does not extend to the taking of private property or the violation of private rights for private ends. The act of the legislature in question, in terms or in effect, authorizes the appropriation of the property of one private corporation and the equitable interests therein of the members thereof to the use of another private corporation and of its members in violation of the corporate charter rights of the former corporation, and in defiance of the wishes of such of its members as do not choose to consent thereto."

In point of fact, the case at bar presents an even clearer case of unconstitutionality than *Huber v. Martin*, supra. Thus, in the *Huber* case there was a Wisconsin statute *specifically* authorizing the "demutualization" of a mutual company; in the case at bar there is no such statutory

[1] Though the Court of Appeals opinion did not dwell upon the "due process" question as such, its basic approval of the District Court holding in this regard appears from the following statement of the Court of Appeals, (Petitioners' Appendix, p. 39; 274 F. 2d 771, 776): "It does not necessarily follow that since Columbus Mutual was a stock corporation, its assets, including surplus, were legally owned by its stockholders to the exclusion of any interest therein by the policyholders on the mutual plan, with the result that the stockholders could deal with the surplus *without obtaining the consent and over the objections of the policyholders*." (Emphasis added.)

authority.[2] In the *Huber* case the statute provided for notice to policyholders; in the case at bar there was no such notice. In the *Huber* case the policyholders had the right to vote; not so in the case at bar. In the *Huber* case the policyholders were given preemptive rights to take some (though insufficient, the court held) stock in the new company. The policyholders have no such rights in the case at bar. In the *Huber* case the statute provided for some (though wholly inadequate) compensation to dissenting policyholders for the surrender of their interests. In the case at bar the policyholders would receive no compensation whatsoever.

It avails Petitioners nothing to speak of the reserved power of the legislature to amend, or authorize amendments of, corporate charters. This argument was specifically rejected by Judge Marshall in the *Huber* case, 127 Wis. 412, p. 434, 105 N.W. 1031, p. 1038. Certainly, the reserved power cannot override the basic dictates of that "sense of fair play—which is the essence of due process". (See opinion of Mr. Justice Frankfurter, *Galvan v. Press*, 347 U.S. 522, 530, 74 S.Ct. 737, 742) As stated by this court in *Shields v. Ohio*, 95 U. S. 319, 324:

[2] Petitioners purport to find authority for their proposed amendment in the general charter amendment statute, Sections 1701.69 and 1701.71, Revised Code of Ohio (Petitioners' Appendix, pp. 62-66). Actually, this statute, a part of the Ohio General Corporation Act, does not deal with insurance companies. Much less does it authorize the conversion of a mutual or "mixed" insurance company into a pure stock company on any basis. Furthermore, the Ohio charter amendment statutes are careful to provide for a vote of all stockholders of a corporation, whether or not holders of stock ordinarily entitled to vote, upon any proposed amendment substantially affecting their rights, and for the payment to dissenting shareholders of the appraised value of their interests. If, as Petitioners now concede, the mutual plan policyholders of Columbus Mutual are the beneficial owners of the company, it is unthinkable that the Ohio legislature could have intended to authorize the Columbus Mutual stockholders to oust the policyholders of their rights without a vote and without compensation for the loss of their property.

> "The power of alteration and amendment is not without limit. The alterations must be *reasonable*, they must be made in *good faith*, and be *consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be inflicted* under the guise of amendment or alteration." (Emphasis added.)

Was it "reasonable" for these stockholders of Columbus Mutual to have used the voting power, entrusted to them by the incorporators, for the selfish purpose of removing the restrictions and limitations upon their interests in the company, imposed upon them under Article V of the original charter? Was it "good faith" for these stockholders to have sought to repudiate the terms of the charter, after having expressly accepted their stock, "subject to the terms and conditions of the Articles of Incorporation", which were incorporated by reference on all stock certificates? Was it "consistent with the scope and object of the act of incorporation" for these shareholders to have attempted to delete from the charter the corporate purpose, set forth therein, eventually to retire the stock and become a fully mutual company? Or, alternatively, was the charter amendment here proposed a flagrant example of the kind of "sheer oppression and wrong", which this court has said, "cannot be inflicted under the guise of amendment or alteration?" *Shields v. Ohio*, supra, 95 U. S. 319, p. 324.

As Judge Marshall said in *Huber v. Martin*, supra, 127 Wis. 412, 105 N.W. 1031, 3 LRA (N.S.) 653, 657-658:

> "This very statement of the (company's) position * * * so shocks the moral sense that one is inclined to enter upon a study of the subject with the impression that no substantial basis can be found for it in the law."

CONCLUSION

In 1956 The Ohio State Life Insurance Company purchased 99.54% of the stock of The Columbus Mutual Life Insurance Company at a per share price almost four times as great as it was subsequently permitted by state insurance authorities to carry it on its books. It gambled that it would be able to relieve its Columbus Mutual stock of the conditions and limitations set out in Article V of the charter, thereby greatly enriching itself far beyond the purchase price.

When it purchased the stock Ohio State expressly agreed to be bound by the charter of Columbus Mutual (for it could not otherwise buy the stock); and it immediately undertook to do exactly what it had just finished contracting not to do—destroy Article V, which is the heart of the Columbus Mutual charter.

It proposed an amendment to Article V that would eliminate the aforementioned limitations, thereby effectively transferring ownership of the immense surplus of Columbus Mutual from its policyholders to the stockholders, notably The Ohio State Life Insurance Company.

The policyholders of Columbus Mutual (who had been given neither voice nor vote on the proposed amendment) protested in vain and then took their grievance to the District Court. That Court and subsequently the Court of Appeals prohibited the adoption of the proposed amendment because it would operate to deprive the policyholders of their vested proprietary interests in the surplus of Columbus Mutual without due process of law and because it would operate retroactively to impair the contractual obligations of the corporation to the policyholders.

That is all that there is to this case! No prospectively operating charter amendment that would not invade the

policyholders' surplus was before the courts below; nor is it here. What is sought, therefore, is an advisory opinion which would be of no great moment to anyone except to the parties to this case.

The Columbus Mutual charter is unique, but plain and clear in its terms; there is no sound corporate purpose for the amendment (it is simply an attempted "raid" by the stockholders on the policyholders' surplus); there is no prohibition against *prospective* charter amendments in the opinions and orders of the Courts below; and the prior decisions in this case are strictly consistent with all of the Ohio cases cited therein and in all of the briefs.

We respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

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